

Buffalo, NY

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ORCHARD MANOR ALP, LLC d/b/a  
ORCHARD MANOR REHABILITATION  
& NURSING CENTER  
Employer

and

Case 03-RC-110739

CSEA, LOCAL 1000, AFSCME, AFL-CIO  
Petitioner

**DECISION AND CERTIFICATION OF REPRESENTATIVE**

The National Labor Relations Board, by a three-member panel, has considered objections to an election held September 19, 2013 and the Hearing Officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement.<sup>1</sup> The tally of ballots shows 48 for and 40 against the Petitioner, with 14 challenged ballots. The parties subsequently stipulated that the challenged ballots should be sustained and not counted.

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<sup>1</sup>Prior to the hearing on objections, the Employer requested that the General Counsel stay the hearing, arguing that the Regional Director lacked authority to determine or certify the results of this election. The General Counsel forwarded the request to the Board for its consideration. We will treat the request for a continuance as a request for special permission to appeal but deny it as moot as the hearing has already occurred and the hearing officer has issued his report. We have addressed the Employer's arguments in resolving Employer Objection 1, which similarly challenges the Regional Director's authority.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the Hearing Officer's findings and recommendations, and finds that a certification of representative should be issued.

The Employer alleges in its Objection 1 that the Regional Director did not possess the authority to determine or certify the results of this election because she had been invalidly appointed in 2009 by a two-member Board that lacked a quorum. *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010). In adopting the hearing officer's recommendation that Objection 1 lacks merit and should be overruled, we agree with him that a duly constituted Board, consisting of five members, on July 6, 2010 lawfully ratified en masse the appointments made by the two-member Board ". . . including but not limited to appointments of Regional Directors, Administrative Law Judges, and Senior Executives."<sup>2</sup>

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<sup>2</sup> Regarding Employer Objection 2, we find that assuming, without deciding, that employee Frasier's Facebook statements could be attributed to the Union, those statements are not objectionable threats, because neither the Union nor Frasier could have caused employees to lose their jobs if the Union did not get voted in. See *Accubuilt, Inc.*, 340 NLRB 1337, 1338 (2003). If viewed instead as campaign propaganda predicting what the Employer would do, Frasier's statements are not objectionable under *Midland National Life Insurance Co.*, 263 NLRB 127 (1982). Finally, even assuming that the other conduct asserted in Objection 2 is before us, we agree with the hearing officer that the Objection 2 conduct, separately or in the aggregate, does not warrant setting aside the election.

**CERTIFICATION OF REPRESENTATIVE**

IT IS CERTIFIED that a majority of the valid ballots have been cast for CSEA, Local 1000, AFSCME, AFL-CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time Licensed Practical Nurses (LPNs) (except whose primary job assignments is a Charge Nurse), Certified Nurses Assistants (CNAs), Cooks, Food Service Workers, Physical Therapy Aides, Physical Therapy Assistants, Activities Aides, Dietary Aides and Maintenance workers, excluding all Registered Nurses (RNs), Charge Nurses (including LPNs whose primary job assignment is Charge Nurse), confidential employees, managers, and guards and supervisors as defined by the National Labor Relations Act.

Dated, Washington, D.C., December 15, 2014.

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MARK GASTON PEARCE, CHAIRMAN

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PHILIP A. MISCIMARRA, MEMBER

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KENT Y. HIROZAWA, MEMBER

(SEAL)

NATIONAL LABOR RELATIONS BOARD